No. 21532

IN THE

United States Court of Appeals
For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

REPLY BRIEF OF APPELLANT

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REPLY STATEMENT OF THE CASE

The settlement made between the parties ended all issues except those which might arise from the replacement shipments (Finding No. 8, R. 300, Appellee's brief, p. 6). The first replacement shipment arrived on August 3rd, and at that date appellee alleges because of rejection of a portion of this shipment, appellee had to alter its proposed method of siding erection and "go forward with the framing of the remaining buildings (without siding) in order to be able to place the roof trusses . . . and to ready buildings for rapid closing when the next shipment arrived" (Appellee's brief, pp. 7, 8).

Appellee's employees made a daily record of the construction progress—daily reports—which listed activity on the various buildings and other phases of the work, weather conditions, number of men on the job, and any delays or hindrances to the job progress. (Ex. 46, not made a part of the record at the suggestion of the clerk because of its bulk.)

The Building Histories appearing in the record at R. 231-271 are taken from these daily reports and tabulate construction progress on an individual building basis, and show how each building came up. Also, the tabulation of "DELAYS—AS LISTED ON DAILY REPORTS," R. 221-228, is an extraction and tabulation of this information from the daily reports (Ex. 46). These Indexes were used by counsel and the court in the progress of the trial (R. 136).

What was the situation on August 3, the date the first replacement shipment arrived at the site? Appellee would have us believe there was little or no good siding available. Appellee's evidence shows conclusively to the contrary.

All eight buildings took a total of 1822 sheets of siding (Finding No. 13, R. 301). On August 3rd, the appellee had some 600 sheets of siding applied, all of which were defective or would be ruined in the process of removal (T. 305, 306). But at that time there were 550 good sheets still available from the first shipment (T. 306) and counting the second shipment which had 690 good sheets (Finding No. 14, R. 302) appellee's superintendent had to admit that as of August 3rd he had over a thousand sheets of good plywood on the job site.

Siding was available as follows:

Defective siding on the buildings	600 sheets
Good siding from original shipment	550 sheets
Good siding from 8-3-61 shipment	690 sheets
Total siding, already on the buildings or GOOD siding available for remaining buildings to be erected	1,846 sheets

This left more than enough *good* sheets from the original shipment and the August 3rd delivery to complete the project, except for removing and replacing defective sheets.

If this is correct, appellee was free to go ahead with the new construction—using any construction method it desired—and hold off removing any replacing siding from the conpleted buildings until the second replacement shipment arrived on August 23. Its own records show that this is exactly what it did. This clearly appears from the flurry of activity—removing and replacing siding—on buildings 846, 847, and 855, recorded in the daily reports for August 25 through 31 (Ex. 46/Building Histories, R. 238 and 242; Finding No. 22, R. 304, 305).

Appellee admitted that it left the rejected siding on those buildings until siding demands for other buildings yet to be completed were satisfied (T. 306, 307).

REPLY ARGUMENT OF APPELLANT

Assignment of Error No. 1

Appellee argues that "second story walls were raised without siding to utilize the crews and keep the job progressing while awaiting further shipment." This is the alleged reason for the change in construction method (Ap-

pellee's brief, p. 14). The only other argument involved sorting and handling of siding for which appellee has been awarded damages and from which no appeal is taken.

No attempt is made by appellee to explain what its crews did with the good siding it had on hand from the original and subsequent shipments. Appellee's own records show that its construction progress was according to a practicable schedule required by the government (Finding No. 25, R.306, and Ex. A and B to Findings, R. 314 and 315).

In fact, appellee's testimony in describing the erection of roof trusses on buildings before any siding was put on them is shown by their own records—again—to be patently false. Appellee's job superintendent testified:

> "A. August 7, 1961, roof trusses set on building 877 *without any siding* . . . August 8, 1961, roof trusses set on building 876, *without any siding*. August 10, 1961, roof trusses set on building 875, without any siding."

Appellee's own daily reports, Ex. 46, shows that in fact, for buildings 876 and 877, *the siding was applied to the second floor walls on* August 5th, two to three days before the roof trusses were erected and in full compliance with the time sequence for the horizontal application method *ALLEGEDLY* not used by the appellee (Ex. 46/Building Histories, R. 261, 265).

For building 875 it is noted that, while no siding is indicated on the daily reports prior to setting the roof trusses, siding was applied on August 17th which was obviously available from the stock on hand on August 3rd (Ex. 46/Building Histories R. 257, 258).

It is clear that appellee not only always had the opportunity to use its horizontal application method but that it in all probability did use it on some buildings it alleged it did not.

Conversely, appellee had elected to NOT use the horizontal method on at least one building *before* any question of rejection came up—on one of the buildings where it alleged the method was used. That is the case of Building 847. It is firmly established that the first siding on any building was placed on June 26, 1961 (R. 311, Finding No. 21, R. 304). However, on Building 847 the second floor framing started as early as June 15th and the roof trusses were set on June 24th—two days before any siding was applied anywhere and, in fact, a full week before any siding was put on that particular building (Ex. 46/ Building Histories, R. 240, 241).

Repeated references to high wind velocities which are found in the daily reports which described concrete block walls blowing down and entire buildings being out of plumb, show the real reason why appellee exercised discretion in its attempts to tilt up wall sections with siding applied (Ex. 46/Delays—As Listed in Daily Reports, R. 221-228).

Assignment of Error No. 2

Appellant takes the position that the alleged method change involved only one-third of the siding, second floor, at any rate.

Appellee again attempts to use the sorting effort for which it has already been compensated to justify added costs to applying siding on the first floor and foundation

walls (Appellee's brief, p. 14). It also mentions bringing material to the buildings and cutting some sheets to fit—procedures which certainly were part of any method of application.

The reference to appellee's job superintendent's testimony (Appellee's brief p. 15) is a reference to applying siding *horizontally*. It was only the one-third of the siding allocated to the second floor walls that was to be applied with the walls "laying down."

The court's assumption that all of the siding would be affected by the alleged change in method is, in fact, clearly erroneous.

Assignment of Error No. 3

Appellant challenges the finding of three man-hours per sheet required for applying (as opposed to removing and re-applying) a sheet of plywood.

The fact that there is no other evidence or testimony on this issue other than that quoted in appellant's brief, R. 331-333, is evidenced by appellee being forced to rely upon exactly the same testimony for this proposition, and no more.

Appellee had put in issue the time required to "remove and replace defective siding" by making claim for some 4,360 man-hours and nearly $40,000 for that item (Ex. 45). The term "remove and replace siding" originates with appellee in these back-charges and in the daily reports (Ex. 45, 46). In order to demonstrate that those back-charge claims were grossly exaggerated and, in fact, in a large part fictitious, the cross-examination of appellee's construction superintendent found in the tran-

script, pages T. 320 through T. 333, was undertaken. The back-charges were clearly the issue (T. 320, 326). Not less than 17 times during this testimony was reference made to the subject matter, i.e., *removing and replacing* siding. Never was a time factor for removing only or putting up only discussed.

Appellee's attempt to take the word "cover" out of context (Appellee's brief, p. 18) and give it a meaning of installation only, excluding the removal operation, does violence to the meaning of the tesimony. There is a dearth of evidence on the time required to place or install a sheet of plywood, and the court's damage formula contains an erroneous factor.

Assignments of Error Nos. 4 and 5

Appellant's position was that another multiplication factor used by the court in its damage formula, a factor of three times the cost of the alleged revised method, was based solely on speculation and conjecture of a biased witness for appellee. Appellee's brief points to no facts whatsoever which give a rational basis for this opinion. This does not comply with the requirements that the plaintiff provide a rational basis for assessment of damages, and is contrary to the holding previously cited in *U.S. v. Griffith, Gornall & Carman,* 210 F. Supp. 11.

Assignment of Error No. 6

The rules of court place upon the nominal prevailing party the right to submit a cost bill in conformity with those rules. Appellee seems to argue that a complete redrafting of its cost bill by the clerk of court, occurring well after the ten-day limit provided by the rules, will

cure the defects in a cost bill which paid no heed to the rules. In effect, this is the clerk's cost bill and not appellee's.

CONCLUSION

The evidence does not support the trial court's findings and conclusions which award $26,000.00 in damages to appellee arising out of an alleged delayed delivery of approximately $4,300 worth of plywood siding. The judgment of the trial court should be reversed as to that award of damages and as to allowing costs and attorney's fees to appellee as prevailing party, with a resulting judgment in favor of apppellant of the net amount of its cross-claim of $10,641.76 exceeds the $1,117.28 in appellee's damages from which no appeal is taken.

Respectfully submitted,

CASEY & PRUZAN

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellant